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No. 94-1698

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DORA B. SCHRIRO, *et al.*,
Petitioners,

v.

JOE D. HEATON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the Eighth Circuit and the District Court properly construe the § 207(o) exemption to the overtime pay provisions of the Fair Labor Standards Act, by holding that § 207(o) does not provide employers the right to unilaterally require employees to use the compensatory time earned pursuant to the statute.

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STATUTORY PROVISIONS

29 U.S.C. § 207(k):

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correction institutions) if—
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which

in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(o):

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understand-

ing arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15 ,1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

COUNTERSTATEMENT OF THE CASE

The district court held that the Petitioners' policy of making Respondents use accumulated compensatory time at times scheduled by the Missouri Department of Corrections (DOC), violated the Respondents' right to preserve their earned compensatory time. The Eighth Circuit Court of Appeals affirmed the district court's decisions. In their statement of the case, the Petitioners exaggerate the effect of the above decisions. In overstating their case, the Petitioners also exaggerate the record established in the district court. Respondents acknowledge that the instant case involves an issue of first impression with respect to an important federal statute. The record and the legal basis for the lower courts' decisions have not, however, accurately been represented in Petitioners' argument for *certiorari*. In this counterstatement of the case, Respondents will comply with Supreme Court Rule 15.1 and attempt to correct Petitioners' misstatements of facts and law.

First, the Petitioners have cited to the record on appeal as a joint appendix. Pet. at 7.[1] That is inaccurate. The Petitioners utilized Eighth Circuit Rule 30A(b)(3), which provides for the filing of separate appendices. Although such an error might seem minor, it assumes greater significance in light of the Petitioners' reliance on that appendix to support their exaggerated claims about the economic consequences of the lower courts' opinions.[2] Allegations and evidence the Petitioners discuss and cite in support of their arguments were not

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[1] Petitioners' Brief for Writ of *Certiorari* is referred to as "Pet. at ——"; Appendix to Petitioners' Brief for Writ of *Certiorari* is referred to as "A. at ——"; Appendix to the 8th Circuit Court of Appeals is referred to as "8th Cir. App. at ——".

[2] Because of omissions from the Petitioners' appendix, the Respondents also found it necessary to file a separate appendix in the court of appeals. Citations to that appendix will be noted as "8th Cir. Supp. App. at ——".

properly before the court of appeals, were not presented to the district court at the time it ruled on the parties' summary judgment motions, and should not be part of any record presented to this Court.

One example of evidence that was improperly included in the record on appeal is an affidavit prepared by Sarah Schuette in September of 1993, nearly three months after the district court had issued its order granting summary judgment. The Petitioners cite to this affidavit and to that portion of their appendix throughout the instant petition. Pet. at 7, 8, 18. They rely on Ms. Schuette's speculation about the financial impact of the rulings below to support their proposition that the manner in which the district court and the court of appeals construed the statute will unduly burden the Petitioners.

Similarly, Petitioners frequently support their positions by making factual statements which are not supported by any evidence in records of the lower courts. For instance, Petitioners state, "Thus the Department, other Missouri state agencies, and other agencies in other states, counties, and municipalities have instituted policies of overtime control intended to keep compensatory time balances at a minimum." Pet. at 19. There is no evidence in the record before the district court, or in the record on appeal, which addressed the policy of any other public employer.[3] Additionally, the statement that severe budgetary constraints exist for other state agencies is not supported by any citation to the record presented to the lower courts. Pet. at 19.

The Petitioners' statement that the Respondents received compensatory time pursuant to an agreement does not fully state the conditions under which these employees are required to accept compensatory time. The district

[3] In fact, neither party was able to provide a response to a question by the Eighth Circuit panel posed during oral argument, in which the court inquired whether other public employers follow the practice of requiring employees to take compensatory time off.

court ruled that, because Missouri law does not provide for the execution of a collective bargaining agreement, the Department of Corrections (DOC) did not have to reach a compensatory time agreement with the plaintiffs' bargaining representative. A. at 31-33. That holding, which has not yet been appealed, validated the DOC's practice of requiring newly hired employees to agree to accept compensatory time as a condition of employment.[4] It also meant that the DOC could assume the existence of an agreement with the employees pursuant to a compensatory time system that was in existence before April 15, 1986. 29 U.S.C. § 207(o)(2)(b). Therefore, although it might be true that the Respondents have agreed to the compensatory time system as a matter of law, it does not necessarily follow that they have agreed to allow their employer to manipulate their overtime compensation in ways that the law does not allow.

On page 16 of their brief, Petitioners state:

> The district court also found that except in isolated instances not pertinent here, the Department of Corrections permitted employees to use compensatory time unless doing so would unduly disrupt Department operations, thus complying with 29 U.S.C. § 207(o)(5). A-38–A-39.
>
> The district court did not find any instance in which an employee had "banked" in excess of the statutory maximum, but was not subsequently paid cash for overtime worked, as required by 29 U.S.C. § 207(o)(3)(A). Nor did the court find any in-

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[4] It is interesting to note that the agreement upon which the Petitioners base their claim that the Respondents have agreed to accept compensatory time does not comply with the Department of Labor (DOL) regulations. DOL regulations require the agreement to be voluntary, and require that the employee be informed that compensatory time may be preserved, used or cashed out, consistent with the provisions of the FLSA. 29 C.F.R. § 553.23(c). The agreement to which the Petitioners refer in their brief contains no indication that the compensatory time may be preserved, used, or cashed out. 8th Cir. App. at 274.

> stance in which an employee who was terminated was not monetarily compensated for compensatory time that he had been unable to use prior to his departure, as required by 29 U.S.C. § 207(o)(4).
>
> The district court and the court of appeals thus found no violation of the law as expressly written by Congress. The employees agreed up front to accept compensatory time, and they were given an opportunity to use the compensatory time they earned.

This passage is, at best, a gross exaggeration of the scope of the opinion rendered by the district court and affirmed by the court of appeals. At worst, the passage is a material misrepresentation of the district court's holding. The Petitioners seek to create the impression that they were exonerated on claims that were not decided by the court, and in some instances were not even presented to the trial court.

The Respondent employees brought a complaint against the DOC in alternative counts. 8th Cir. App. at 39-118. The first count stated a claim that the Petitioners had violated the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (as amended) ("FLSA" or "the Act"), by requiring the employees to accept compensatory time without first reaching an agreement with the employees' bargaining representative. The district court, relying on this Court's decision in *Moreau v. Klevenhagen*, —— U.S. ——, 113 S. Ct. 1905 (1993), and the district court's interpretation of Missouri law, ruled that the Petitioners were not required to reach a compensatory time agreement with the union representing the Respondents. A. at 31-33. That claim is the only one on which the district court ruled in favor of the Petitioners. Final judgment has not been rendered on that portion of the district court's judgment, and consequently, no appeal has been taken.

The Respondents stated a claim in their second count that the Petitioners had violated the FLSA by failing to grant requests for compensatory time off, when granting

such requests would not unduly disrupt agency operations. 8th Cir. App. at 116-117. Both parties moved for summary judgment on that claim, and both motions were denied. The district court found a factual dispute over the issue of whether the Petitioners' denials of requests for compensatory time had been reasonable. A. at 38-39. Subsequently, the parties settled that issue short of trial. Petitioners are simply wrong in asserting that the district court, "found . . . the Department of Corrections permitted employees to use the compensatory time unless to do so would unduly disrupt Department operations. . .". Pet. at 16.

The Respondents' complaint contained no claim that employees who had exceeded the compensatory time cap were not paid for excess overtime,[5] or that terminated employees were not paid for their accumulated compensatory time. Just as there has been no judicial finding of a violation of those requirements, there has also been no judicial determination of *compliance* with them. The Petitioners' record of compliance or non-compliance with § 207(o)(3)(A) or § 207(o)(4) is not part of the record in this case. Their assertion that they are law-abiding employers is simply immaterial to the issue for which the Petitioners seek review.

The Petitioners seek review of the judgment issued on the second claim asserted under Count II of the Respondents' complaint. That claim asserted that the Petitioners violated the FLSA by forcing employees to take compensatory time off at times when they had not requested it. 8th Cir. App. at 117. The Petitioners have acknowledged that, as matter of policy, the DOC will require employees to take compensatory time off for the purpose of reducing the employees' compensatory time balance. Both the district court and the court of appeals

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[5] The record contained no evidence of even one instance in which the DOC had been required to pay cash overtime to an employee whose compensatory time balance exceeded the cap.

found that the § 207(o) amendments to the FLSA do not sanction such a policy. A. at 9-13, 35-38.

Similarly, there are assertions of fact made in the body of the Petitioners brief that were not presented to either the district court or to the court of appeals. For instance there was no evidence presented to the courts that "[n]early all of these inmates are felons, many of them are serving sentences for the commission of violent crimes." Pet. at 7. Although it is not entirely clear how such a statement supports a policy that requires correctional officers to take time off work when they do not want it, there is simply no evidence in the record which supports Petitioners' assertion.

On page 18 of their brief, the Petitioners suggest that Congress enacted § 207(o)'s compensatory time provisions in order to provide employees with physical and mental relief after they have worked overtime. Petitioners provide no citation to any such statement in the legislative history, and none could be found.

Another broad statement that is unsupported by citation to the legislative history, is the Petitioners' speculation that "[s]o long as *Usery* was the law, Congress remained comfortable in having states exempted from FLSA coverage by virtue of constitutional law as it was then understood." Pet. at 20. One would not expect to find such a statement in the legislative history. It is illogical to state Congress, which had in 1974 enacted amendments to the FLSA that extended the Act's coverage to millions of public employees, was "comfortable" with that legislative action having been held unconstitutional. The above statements are a transparent attempt to re-write legislative history as the Petitioners wish it were. As both the district court and the court of appeals discovered, however, the legislative history made it clear

that Congress intended to include public employees within the protective umbrella of the FLSA.[6]

SUMMARY OF ARGUMENT

The United States District Court for the Western District of Missouri granted summary judgment in favor of Respondents, plaintiffs in that court, finding that the Petitioners had violated the Fair Labor Standards Act. The district court ruled that the Petitioners' policy of forcing employees to take compensatory time off at times that they did not want it violated § 207(o) of the Act. In reaching that conclusion, the court considered the text of § 207(o), the legislative history of the 1985 Amendments to the FLSA (which added § 207(o)), and the regulations promulgated by the Department of Labor (DOL). In light of those sources, the court determined that Congress intended to vest the right to use compensatory time solely in the employee, and that the Petitioners' policy interfered with the employees right to preserve compensatory time. The United States Court of Appeals for the Eighth Circuit affirmed both the reasoning of and the result reached by the district court.

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[6] *See* Sen. Rep. 99-159, page 7.

> In seeking to guarantee a minimum standard of living for all working Americans, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into socially desirable channels. By 1974, FLSA coverage extended to three-fourths of the nation's employed non-supervisory labor force; federal, state and local government employees were the only major exceptions. Federal workers now have been protected for more than a decade, but most state and local government employees only became covered as of the Supreme Court's *Garcia* decision in February 1985. The Committee is not retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments. The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.

Although the question presented to the district court was an issue of first impression, the Petitioners gave the matter very little attention in their briefing on the summary judgment motions. The arguments presented in the Petitioners' appeal to the Eighth Circuit, and expanded upon in their petition for *certiorari*, were not presented to the district court. Many of the allegations that the Petitioners now make in support of their arguments in this Court were simply not a part of the record developed in the district court. The Petitioners have failed to assemble a record sufficient to provide proper review of an important federal question.

Nevertheless, even had the Petitioners presented evidence to the district court to support the arguments now contained in their petition for *certiorari*, their arguments would have failed. Although Petitioners accuse the lower courts of ignoring a "cardinal rule" of statutory construction, it is the Petitioners who have failed to appreciate the import and effect of that rule. As this Court has recently recognized, exemptions from the Fair Labor Standards Act's overtime pay provisions must be narrowly construed. Viewed in the context of that statutory principle, the rule that "[c]ourts cannot supply omissions in a statute" operates against the Petitioners. The lower courts correctly recognized the limited scope of the § 207(o) exemption. Neither the text of the statute nor its history provide an employer with the authority to assign compensatory time off. Therefore, the district court and the court of appeals agreed that the Petitioners' attempt to exercise such control over the Respondents' compensatory time balances violated the FLSA.

The Eighth Circuit, the only court of appeals to have considered this issue, reached a conclusion that was consistent with the underlying purposes of the Fair Labor Standards Act, and with the Fair Labor Standards Act Amendments of 1985. The Louisiana district court decision cited by the Petitioners as inconsistent with the

Eighth Circuit's decision has not been reviewed by any court of appeals. The limited analysis of the issue presented in that case does not give this Court an opportunity to determine whether there is truly a difference of opinion among the circuits.

The record on which the Petitioners base their arguments was not developed in the United States District Court for the Western District of Missouri, and if such a record were developed in the District Court for the Northern District of Louisiana, it is not apparent from the decision in that case. The issue of statutory construction presented in this case was correctly decided by the Missouri District Court and by the Eighth Circuit. The Petitioners have provided the Court with no reason to issue a writ of *certiorari*.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT AND THE COURT OF APPEALS, IN FINDING THAT § 207(o) OF THE FAIR LABOR STANDARDS ACT DOES NOT ALLOW EMPLOYERS TO FORCE THEIR EMPLOYEES TO SPEND THEIR EARNED COMPENSATORY TIME, PROPERLY CONSTRUED THE § 207(o) EXEMPTION TO THE FAIR LABOR STANDARDS ACT IN LIGHT OF THE WELL-ESTABLISHED STATUTORY CONVENTION THAT EXEMPTIONS TO THE OVERTIME PAY PROVISIONS OF THE ACT MUST BE NARROWLY CONSTRUED.

A. Because The Petitioners Did Not Acknowledge The Importance Of This Issue Of First Impression In Their Arguments Before The District Court, The Record Has Not Been Sufficiently Developed To Justify Supreme Court Review.

Petitioners contend that this Court should review the Eighth Circuit's opinion and the district court's decision, because the issue decided in those opinions involves an important question of federal law. The lower courts did

indeed decide an issue of first impression. Properly stated, that issue concerns whether the § 207(o) exemption to the FLSA allows employers to unilaterally determine when employees must expend compensatory time which has been earned as premium pay under the statute. It is obvious, however, that the Petitioners did not recognize the importance of this question when they presented their summary judgment arguments to the district court.

In the district court, the Petitioners acknowledged that although a purportedly small number of employees objected to the forced use of compensatory time, the DOC required employees to take compensatory time off as a matter of policy. In support of that policy, the Petitioners contended that such forced time off was necessary to protect the security of the institutions. Specifically, Petitioners stated that "SUMMARY JUDGMENT MUST BE GRANTED WITH REGARD TO COUNT II OF PLAINTIFFS' AMENDED COMPLAINT SINCE DEFENDANTS REASONABLY COMPLIED WITH EMPLOYEE REQUESTS TO USE COMPENSATORY TIME AND ONLY REQUIRED EMPLOYEES TO USE COMPENSATORY TIME TO AVOID SHORT-STAFFING AND SECURITY THREATS." 8th Cir. Supp. App. at 38. Petitioners did not explain, however, how the removal of some officers from service (by forcing them to take compensatory time off) prevented short-staffing problems or contributed to the security of the institution.

The arguments that the Petitioners now advance, *i.e.* that if employees are allowed to preserve their compensatory time, the Department of Corrections will suffer dire economic consequences, was not developed in their summary judgment papers. Therefore, the Petitioners did not present evidentiary support for that argument (assuming that such evidence even exists).[7] Because those argu-

[7] The affidavit concerning the economic consequences of the district court's order was submitted in support of the Petitioners' request to obtain interlocutory appeal of the summary judgment

ments were not presented to the district court at the time the parties briefed the motions for summary judgment, Respondents did not have an opportunity at that time to respond to those arguments or to test the sufficiency of any evidence the Petitioners might have submitted in support. In essence, the Petitioners seek review of the district court's opinion on the basis of arguments that have not been litigated and evidence that has not been tested. This Court is asked to reverse the judgment of the district court on the basis of an analysis that the district court never had an opportunity to consider.

B. The District Court And The Court Of Appeals Carefully Considered The Language Of § 207(o), The Regulations Implementing The § 207(o) Exemption, And The Legislative History, And Properly Determined That The Act Provides Employees With A Right To Preserve Accumulated Compensatory Time.

Although the district court did not hear the arguments now advanced by the Petitioners, it did consider the statu-

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order. The Respondents did not oppose the request for interlocutory appeal because it was in line with the parties' agreement to resolve questions of liability prior to pursuing remedies. Because the request for an interlocutory appeal was not an adversarial proceeding, the Respondents had no opportunity or motivation to contest the materials submitted in support of the Petitioners' motion. Insofar as the underlying merits of the summary judgment motions had already been ruled upon by the district court at the time the Schuette affidavit was submitted, the allegations contained therein have no relevance to this Court's review of the summary judgment order.

Moreover, the Schuette affidavit can hardly be considered sufficient evidence to establish a right to relief from the requirements of § 207(o). The affidavit consists of Ms. Schuette's speculation about how DOC employees will behave when they are given the opportunity to use their compensatory time when they want to rather than when the Department of Corrections wants them to take it. It is not supported by any data that would demonstrate the propensity of correctional officers, or of any other employees, to accumulate large balances of federal compensatory time.

tory, historical, and regulatory bases in concluding that employees have a right to preserve their compensatory time. First, the court found support in § 207(o)(5), which, by strictly limiting the employer's authority to deny requests for compensatory time, endowed the employee with considerable control over its use. A. at 35-37. The court found further support in the regulations promulgated by the Department of Labor. Specifically, the court cited 29 C.F.R. § 553.25(b), which defines requested use of compensatory time as a right; 29 C.F.R. § 553.23(c)(2)(ii), which requires an employer to inform an employee from whom it seeks a compensatory time agreement that the compensatory time can be preserved; and 29 C.F.R. § 553.25(d), which emphasizes the lengths to which employers must go to comply with employee requests for compensatory time. A. at 36.

The court also found persuasive the Department of Labor's reference to the practice of "banking" compensatory time. *See* 51 Fed. Reg. 25710, 25713 (1986).[8] The court concluded that such language aptly described compensatory time as an earned right, which would be "severely devalued" if the employer were allowed to unilaterally dictate when the employee must expend such earnings. A. at 36-37.

Although the Petitioners presented very little to the district court in the way of analysis of this issue, or evidence in support of such analysis, they did expand their argument somewhat before the court of appeals. In the court of appeals, the Petitioners continued with their argument that § 207(o) allowed the DOC to require employees to take compensatory time in order to avoid undue disruption of agency operations. It became clearer from that argument that the undue disruption to which the Petitioners referred was directed more to the DOC's

[8] The court would have also found the legislative history helpful in this regard. *See* Rep. 99-159, p. 4 ("An employee may *bank* up to 480 hours of comp time . . ."). (emphasis added).

budget than it was to actual operations. After having had an opportunity to consider those arguments, the Eighth Circuit found them to be unpersuasive.

The court of appeals rejected the Petitioners' argument that the potential payment of cash overtime compensation amounted to an undue disruption of agency operations. The court pointed out that § 207(o) contains explicit provisions requiring public employers to pay cash for overtime under appropriate circumstances and concluded "the prospect of having to comply with a Congressionally enacted public policy initiative cannot be deemed to be 'unduly disruptive' of the employer's operation." A. at 12, 13.

The Eighth Circuit also agreed with the district court's conclusion that employees have a right to use compensatory time at their discretion rather than at the discretion of the employer. The court of appeals found ample support for that conclusion in the language of the statute, in the Department of Labor regulations, and in the overall purpose of the statute.

First, the court agreed with the characterization of an employee's compensatory time balance as a savings account—a compensatory time "bank." [9] The earned compensatory time becomes the employee's property much the same way as the money would be if the employees were paid cash for the overtime worked. The court of appeals found the characterization of the compensatory time balance as a bank account, or as the employee's property, consistent with the way compensatory time had been treated in the Department of Labor regulations. The regulations explicitly refer to compensatory time as a

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[9] Both the legislative history and the regulatory history include references to "banking" compensatory time. *See* Sen. Rep. 99-159, Page 4 ("An employee may bank up to 480 hours of comp time") (i.e. 8 weeks—320—hours of overtime worked); 51 Fed. Reg. 25710, 25713 (July 16, 1986).

"right" of the employee, and require employers to inform employees that "compensatory time may be preserved." A. at 9-10.

The court of appeals also noted that the explicit language of § 207(o)(5) gives only employees the right to access that compensatory time bank, which they do by making requests for use of compensatory time. The employee's exclusive access to that bank is qualified only by the employer's ability to deny requests when, to grant such request, would be unduly disruptive to agency operations.[10] That explicit allocation to the employee of the right to request compensatory time, and the absence of any provision allowing the employer to assign compensatory time, led the court of appeals to the conclusion that the DOC's forced use policy is inconsistent with the language of § 207(o).[11]

The decisions of both the district court and the court of appeals that the Petitioners had violated the FLSA were based on the only evidence that they really needed to consider: the Petitioners admitted that, as a matter of policy, the DOC required employees to take compensatory time off for the economic advantage of the employer. Appellate brief at 9. The statutory and regulatory lan-

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[10] The court of appeals found it significant that Congress saw fit to provide for some disruption of public agencies, in that the statute only allows the employer to deny requests when the time off would "*unduly* disrupt" agency operations. A. at 11-13 (emphasis in court's language) The significant discretion that language gives employees in choosing when to use their compensatory time leaves no room for an interpretation of the statute that would allow employers to manipulate compensatory time balances simply to avoid future budgetary concerns.

[11] The court of appeals also found the policy inconsistent with one of the fundamental purposes of the FLSA—to expand employment opportunities. The DOC could address its concern about large accumulations of compensatory time by hiring more employees, and thereby diminishing the necessity for overtime. A. at 13 (citing *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444, 446 (8th Cir. 1978)).

guage provided the court with a sufficient basis to determine that the Petitioners' policy exceeded the scope of exemption granted by § 207(o).

The Petitioners now seek review on the basis of factual assertions that were not before the district court, factual assertions that were improperly included in the record on appeal, and still other factual assertions that are first advanced in the petition for *certiorari*. The Petitioners apparently find it necessary to attempt to supplement the record because the record developed in the trial court simply will not support their desperate effort to avoid the duties the FSLA imposes on all employers.

The instant circumstances do not present a case in which the lower courts have incorrectly decided an important question of federal law. What has really happened here is that the district court decided against the Petitioners on an issue that the Petitioners really had not given much thought.[12] After receiving a disappointing result, the Petitioners determined that the issue *was* of consequence. The Petitioners' disappointment with the results obtained in the trial court is not enough, however, to warrant Supreme Court review. The Petitioners' failure to develop their argument, and the record, on this issue at the district court level is not saved by subsequent elaboration to the Eighth Circuit or this Court. Consequently, the record does not contain sufficient factual development to allow, or warrant a grant of a writ of certiorari.

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[12] In their Suggestions In Support Of Motion For Summary Judgment, Petitioners devoted less than two pages of a twenty nine page documents to this issue. *See*, 8th Cir. Supp. App. at 39-40. In their Controverted Issues Of Material Fact And Suggestions In Opposition To Plaintiffs' Motion For Summary Judgment, Petitioners simply drop a footnote referring the court to its earlier brief. *See*, 8th Cir. Supp. App. at 7, n.22.

C. The Construction Of § 207(o) Reached By The District Court And By The Eighth Circuit Is Consistent With The Principles Of Statutory Construction Applied To That Subsection In A Recent Decision By This Court.

This Court has recently considered the construction of § 207(o) in *Moreau v. Klevenhagen*, —— U.S. ——, 113 S. Ct. 1905 (1993). Although *Moreau* involved a different issue than the one presented here, the Court, in a unanimous decision, reiterated a principle that has long guided courts in their construction of the FLSA. In *Moreau*, the Court recognized that § 207(o) is "an exemption to the general FLSA rule mandating overtime pay for overtime work, and employers may take advantage of the benefits it offers 'only' pursuant to certain conditions set forth by Congress. . . ." *Id.* at 1912, n.16. The Court also reaffirmed the principle that exemptions to the FLSA must be narowly construed. *Id.* at 1911; *see also Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960) (narrowly construing the retail establishment exemption).

The Petitioners' argument to this Court calls for an extremely broad interpretation of an employer's right to control compensatory time. Petitioners suggest that, in order to grant the employer the flexibility intended by Congress, the Court must construe § 207(o) to allow the DOC to unilaterally determine when an employee must expend the compensatory time earned pursuant to the FLSA. Such a broad construction of the statute would run counter to the principle stated in *Moreau*, that § 207(o) must be narrowly construed.[13]

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[13] Petitioners conveniently ignored this principle in their argument concerning statutory construction. Pet. at 22. In light of this principle, the Respondents will heartily endorse the two quotations included in the Petitioners' brief: "Courts cannot supply omissions in a statute." *Lewis, Roca, Scoville, & Beauchamp v. Inland Empire Ins. Co.*, 259 F.2d 318, 323 (10th Cir. 1958); and "Congress expresses its purposes by words. It is for us to ascer-

Section 207(o) refers only to *requests* for compensatory time. Nowhere does the statute mention assignment of compensatory time off. The only power the statute gives the employer to affect the employee's use of compensatory time is the power to deny a request when the time off would unduly disrupt agency operations. In light of the explicit authority § 207(o) grants employees to request compensatory time, the explicit limit that the statute places on the employer's ability to deny such a request, and the statute's utter failure to mention assigned use of compensatory time, one must conclude that an appropriately narrow construction of the statute does not allow an employer to assign an employee compensatory time off.

This narrow construction of the § 207(o) exemption does not prevent any court from construing the statute in a manner that provides public employers with all of the flexibility that Congress intended.[14] Indeed, the statute and the DOL regulations continue to provide employers with a number of means of obtaining budgetary flexibility.[15] Although the DOC has taken advantage of most

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tain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). In the absence of statutory language broadening the § 207(o) exemption to give the Petitioners the right to force employees to take compensatory time off, the statute will not allow it.

[14] Contrary to the Petitioners' assertion, Congress did not intend to allocate all of the flexibility under the statute to the employers. Congress explicitly stated that "The bill provides flexibility for employers and *employees* . . ." Sen. Rep. 99-159, P. 4 (emphasis added).

[15] Examples of such flexibility include the § 207(k) exemption to the FLSA, which allows public employers to use a 28 day work cycle for public safety employees, including the Respondents in this case. Under that provision, a prison guard must actually work over 171 hours in the 28 day cycle before he or she will accrue overtime. If an employee takes a paid holiday, is sick, uses vacation, or is absent from work for any other reason, overtime does

of the opportunties for flexibility, the Petitioners are not satisfied with the advantages explicitly granted by Congress and the Department of Labor. Petitioners also want to enforce a policy that allows them to usurp the flexibility Congress intended to provide employees.[16] Because the lower courts complied with the long established principles governing construction of the FLSA, this Court need not issue its writ to review those decisions.

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not accrue until the time the employee has spent on the job exceeds 171 hours. Public safety employees are also subject to a higher cap before the employer is required to make cash overtime payments. The correctional officers may accrue 480 rather than 240 hours of overtime. 29 U.S.C. § 207(o)(3)(A). The employer also retains operational flexibility in that it can deny requests for compensatory time if such denials are necessary to avoid undue disruption of agency operations. § 207(o)(5). Finally, the FLSA regulations provide employers with the option of converting to a cash payment method at any time. Under that regulation, the employer may even elect to pay off the compensatory time balance, yet continue to provide compensatory time as payment for future overtime. 29 C.F.R. § 553.26(a).

[16] The legislative history made it clear that the FLSA Amendments were not intended solely to benefit employers. For example both the Senate Report and the House Report indicated that the amendments were intended to provide flexibility to employers *and* an element of choice to employees. Sen. Rep. 99-159, p. 4; H. Rep. 99-331, p. 19.

The legislative history also reflected Congress' intention to retain the principle of premium pay for overtime. H. Rep. 99-331, p. 23; H. Conf. Rep. 99-357 ("The compensatory time and deferred effective date provision of these amendments are to relieve the economic impact of having to comply with the FLSA's premium rate requirements for overtime. Having provided for this relief, we agreed to preserve the same premium rate that has been part of the FLSA for nearly 50 years. We did not, at the same time authorize employers to undermine that premium rate with impunity.")

Moreover, Congress was determined to provide employees with an opportunity to make "beneficial use" of their compensatory time. H. Rep., p. 23. The employee obtains beneficial use of the compensatory time by taking it when he or she wants to, not at the convenience of the employer.

II. BECAUSE NO OTHER COURT OF APPEALS HAS CONSIDERED THE QUESTION DECIDED BY THE EIGHTH CIRCUIT, THERE IS NO SPLIT OF AUTHORITY ON THIS ISSUE SUFFICIENT TO WARRANT SUPREME COURT REVIEW.

One of the reasons the Petitioners advance for this Court's review of the Eighth Circuit's decision is the existence of a purportedly contrary decision by a district court in Louisiana: *American Federation of State, County and Municipal Employees, Council 17 v. Louisiana,* 1 Wage & Hour Cas. 2d (BNA) 1541, 1994 WL 86679 (E.D. La. March 4, 1994) (hereafter *AFSCME*). Pet. 25. That purported conflict does not serve to satisfy Supreme Court Rule 10.1(a), which provides that conflicts between the decisions of courts of appeals provide a reason for granting *certiorari.* No other federal court of appeals has reported a decision on the issue decided in this case: whether a public employer may require employees to deplete their compensatory time banks by taking compensatory time off at times designated by the employer.

For that matter, contrary to the assertions made by the Petitioners, the *AFSCME* court did not address the issue presented in the instant case. Here, the Petitioners assert that the courts below erred in finding that § 207(o) did not provide employers with a means to force employees to take time off solely for the purpose of depleting their compensatory time bank. In *AFSCME,* however, the court considered whether a computerized bookkeeping system that automatically subtracted requests for leave from the employee's compensatory time bank violated the FLSA. *AFSCME,* 1 WH2d at 1544. There was no indication that the employer was forcing the employees to take compensatory time off. There was simply a dispute concerning the manner in which the employer accounted for requested leave. *Id.*

The Petitioners also assert that the *AFSCME* court rejected the arguments that the Respondents have advanced in this case. (Pet. at 26). A review of the *AFSCME* opinion reveals that the court engaged in very little analysis at all. Certainly, the court did not reach the arguments advanced in the instant case. The AFSCME court based its decision on the failure of the plaintiffs in that case to cite to a provision of the FLSA that the state's accounting practice violated, or to cite a case that supported their proposition. The court did not indicate that it considered the decision rendered by the Missouri district court.[17]

The *AFSCME* court also failed to consider one of the principles that, as discussed above, this Court has recently reaffirmed: that exemptions to the FLSA must be narrowly construed. *See Moreau v. Klevenhagen,* —— U.S. ——, 113 S. Ct. 1905, 1911 (1993). In light of the failure of the Louisiana district court to consider the principle guiding the proper interpretation of the FLSA, any alleged conflict between that district court's decision, and the opinion rendered by the Eighth Circuit Court of Appeals should be resolved by appellate review within the Eleventh Circuit.

The Louisiana district court conducted very little analysis of the plaintiffs' complaint about the depletion of their compensatory time balances, and its decision on that issue has not been reviewed by the Eleventh Circuit. No court of appeals other than the Eighth Circuit has had the opportunity to determine whether an employer may confiscate employees' right to choose when to use their earned compensatory time. The Petitioners in this case presented the district court with very little evidence or argument in support of its position that employers should have such a right. In light of the scant development of the law on this issue, it is not ripe for Supreme Court review.

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[17] The Eighth Circuit had not yet rendered its decision.

CONCLUSION

For each of the reasons stated above, the Respondents respectfully request that the Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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